(3)

Supreme Court, U.S.
FILED
SEP 1 1994
OFFICE OF THE CLERK

No. 94-15

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WATERGATE AT LANDMARK CONDOMINIUM,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR PETITIONER

WILLIAM F. CAUSEY *
SCOTT ALTON MILLS
JACKSON & CAMPBELL, P.C.
1120 - 20th Street, N.W.
South Tower
Washington, D.C. 20036-3437
(202) 457-6732
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

7 pp

TABLE OF AUTHORITIES

CASES — Page

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) 3, 4
EEOC v. Manville Sales Corp., 27 F.2d 1089 (5th Cir. 1994) 4
Fowler v. Carrollton Public Library, 799 F.2d 976 (5th Cir. 1986) 4
Pembaur v. Cincinnati, 475 U.S. 469 (1986) 3, 4
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) .. 2, 3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-15

WATERGATE AT LANDMARK CONDOMINIUM,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR PETITIONER

The brief in opposition ("Opp. Br.") filed by respondent EEOC fails to address the compelling reasons put forward by petitioner Watergate at Landmark Condominium ("Watergate") why this Court should review the decision of the court below.[1] Instead of directly responding to the issue of whether a judgment under the Age Discrimination in Employment Act can rest on the stray remarks of individuals who are not ultimate decision-makers in the employment action under review, EEOC

[1] Watergate respectfully refers the Court to its Petition for Writ of Certiorari for its Rule 29.1 Statement. Pet. for Cert. at ii.

devotes most of its brief in opposition to a recitation of the facts which are not in dispute between the parties and are not dispositive of the question of law presented by this case. It remains true that the Fourth Circuit's decision is based on stray comments made by two individuals recognized by the Fourth Circuit not to be the ultimate decisionmakers in this case. Pet. App. 8a. The Fourth Circuit's decision is contrary to a majority of the circuits that have addressed this question. The frequency with which this issue is raised in employment discrimination cases calls for a clear and uniform rule of law from this Court.

1. EEOC wants this Court to believe that this case involves only a question of sufficiency of the evidence. Opp. Br. at 7-8. Yet, EEOC fails to remind this Court that it conceded at trial—and the Fourth Circuit apparently accepted as true—the fact that the random and isolated alleged age-based comments of David Cearnal and Jack Armistead were never communicated to the ultimate decisionmakers of this employment action. Equally significant is that nowhere in its brief in opposition does EEOC confront a critical element in this case—one again recognized by the Fourth Circuit—that Cearnal and Armistead were not the ultimate decisionmakers in the Nozick employment action. Pet. App. 8a. It is telling that EEOC does not cite a single case in its brief in opposition that would support a vedict under the ADEA which is based on stray comments by non-decisionmakers. To the contrary, in its petition Watergate cited numerous cases which stand for the proposition that ADEA verdicts cannot flow from evidence of stray comments by non-decisionmakers or comments that are not communicated to the ultimate decisionmakers.

2. EEOC relegates to a footnote its attempt to blunt the impact that this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), has on the question presented by this case. Opp. Br. at 8 n.2. At the least,

Price Waterhouse calls for some evidence of discrimination that is "credited by . . . the decisionmakers," and that played a "substantial factor in the decision." 490 U.S. at 272 (O'Connor, J., concurring). The plurality opinion in *Price Waterhouse* demands at least some nexus between comments or actions of non-decisionmakers and the employment decision under review. EEOC fails to address this point in its discussion of *Price Waterhouse*. Opp. Br. at 8 n.2. To be sure, this case presents this Court with an excellent opportunity to clarify and strengthen the sound principle of law announced in the plurality decision in *Price Waterhouse*.

EEOC also fails to appreciate the collective principle of law that flows from this Court's decisions in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), and *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), that liability in employment cases must be predicated on the actions of someone who is an official policymaker or ultimate decisionmaker. EEOC cannot dismiss these cases by merely suggesting that they are "a concern limited to suits against municipalities." Opp. Br. at 11. To say that liability under the ADEA is different because it can be based on the conduct of an employer's agents misses the point. Those agents must be individuals who carry the imprimatur of authority to act, and not be isolated individuals who, while technically defined as limited agents under the rules of evidence, make stray comments remote in both time and place to the employment decision under review.

3. EEOC also refuses to acknowledge in its brief in opposition the sharp conflict which exists among the circuits on the issue of whether an ADEA judgment can be based on comments by non-decisionmakers. Indeed, it is significant that EEOC does not even make the attempt to distinguish a single case cited in the petition that portrays the conflict that currently exists beween the Second and Fourth Circuits, on the one hand, and the First, Third, Fifth, Sixth, Seventh, Tenth and Eleventh Circuits,

on the other hand. This conflict is real, recurring, and in need of resolution.

The only new case not previously addressed by the parties raised by EEOC in its brief in opposition is *EEOC v. Manville Sales Corp.*, 27 F.3d 1089 (5th Cir. 1994). Opp. Br. at 9 n.3. The *Manville* decision can be distinguished from the instant case on its facts. In *Manville*, the negative age remarks at issue were made by the employee's direct supervisor who was the decisionmaker-in-fact of the employment action under review.[2] That is not the situation here. Neither Cearnal nor Armistead had any employment authority at Watergate. To be sure, EEOC strains credulity to suggest that stray comments made on a tennis court months before the employment decision in question can be the basis for a finding of liability. In short, the *Manville* case does not present this Court with a reason why the petition should be denied.

The brief in opposition falls woefully short of addressing the several compelling reasons why this case should be reviewed by this Court. There is a need to tie together this Court's decisions in *Price Waterhouse, Praprotnik*, and *Pembaur* into a uniform, clear, majority holding that sets forth the logical rule of law that employment discrimination liability, if based on comments and remarks about the employee, must be a reflection of the true motive of the ultimate decisionmakers regarding the employment action under review. At the least, any stray remarks must be communicated to the ultimate decisionmakers for the comments to have any probative value to show that the decision was motivated by a discriminatory purpose. Moreover, the conflict that exists among the

---

[2] The decision in *Manville* does not change the long-standing rule in the Fifth Circuit that the conduct and remarks of persons without authority to hire or fire are not relevant to an ADEA charge. *See Fowler v. Carrollton Public Library*, 799 F.2d 976, 984 (5th Cir. 1986). *See also* Pet. for Cert. at 12-13.

circuits—and even within one circuit [3]—independently justifies review of this case by this Court. Finally, the number of times this issue arises in federal employment litigation is notable, and the federal courts should have a clear rule of law to follow for future cases.

CONCLUSION

For the foregoing reasons, and those in the petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

WILLIAM F. CAUSEY *
SCOTT ALTON MILLS
JACKSON & CAMPBELL, P.C.
1120 - 20th Street, N.W.
South Tower
Washington, D.C. 20036-3437
(202) 457-6732
Counsel for Petitioner

* Counsel of Record

[3] *See* Pet. for Cert. at 14-16 for a discussion of the conflict that exists within the Seventh Circuit on this issue.